**BEFORE THE**
**WORLD TRADE ORGANIZATION**
**APPELLATE BODY**

# *United States - Countervailing Measures Concerning Certain Products from the European Communities*

**(AB-2002-5)**

## ORAL STATEMENT OF THE UNITED STATES OF AMERICA

October 22, 2002

***** CHECK AGAINST DELIVERY *****

1. Good morning Mr. Chairman, members of the Division. The U.S. delegation appreciates this opportunity to present the views of the United States in this appeal.

## I. The Panel Erred in Finding That Commerce's New Methodology Is Inconsistent With the SCM Agreement

2. In finding that subsidies must be regarded as having been received by composite entities consisting of the companies upon which they are bestowed together with the shareholders of those companies, the Panel adopted an interpretation of the SCM Agreement that is inconsistent with the ordinary meaning of its key terms in the context in which those terms are used and in light of the object and purpose of the Agreement. We explained in our appellant submission that the Panel erroneously failed to recognize that subsidies benefit the legal persons upon whom they are bestowed and remain attributable to those legal persons until they have been fully amortized. Because companies are distinct from their shareholders, whether a subsidy to a company continues to be countervailable does not depend upon the subsequent behavior of those shareholders, unless they bring about the dissolution of the company.[1]

3. The sale of a government-owned company's shares to new shareholders simply substitutes one investor whose behavior does not affect previously-bestowed subsidies for another investor or investors whose behavior does not affect those subsidies. This is true regardless of whether the government owns 100% of the subsidy recipient's shares and sells them all, or owns 51% of its shares, and sells 2%. In either case, the change in ownership, as such, leaves the company in the same enhanced position the day after the sale as it was in the day

[1] U.S. Appellant Submission, paras. 99 - 102.

before. The change in ownership, whether large or small, does not transform the company into a new legal person that has never received a subsidy.

4. I do not want to belabor what we said in our appellant submission. If the Division has any questions about these matters, I will be happy to answer them. The EC's written submission introduces a number of additional errors, which are as follows:

5. **First, the SCM agreement does not require investigating authorities to disregard the normal distinction between companies and their shareholders.** Governments subsidize producers and exporters (which, in the words of the SCM Agreement, are "firms"[2] or "enterprises"[3]) – not the shareholders of those producers and exporters. This is most obvious where (as in all 12 cases here) the government is the shareholder of the subsidy recipient – the government bestows the subsidy upon the company in which it owns shares, not upon itself. If the shareholders of a subsidy recipient ultimately profit from the subsidy through higher dividends or an increase in the value of their shares, these profits are not financial contributions from the government and the amount of the dividends or increase in share value bears no necessary relation to the amount of the subsidies, as valued under Article 14 of the SCM Agreement. If a shareholder takes money from the company in which it owns shares through means other than dividends (or payment for services rendered) this is simply theft – unlawfully taking something that belongs to another person.

[2] *E.g.*, Articles 8.2(a) and (c) and 14(b) and (c).
[3] *E.g.*, Articles 2 and 6.1(c).

6. The EC's conclusion that the SCM Agreement requires this clear distinction to be ignored relies heavily on two arguments – a misreading of the Appellate Body's decision in *Canada Aircraft* and a misinterpretation the Oxford English Dictionary's definition of the word "firm."

7. In *Canada Aircraft*, the Appellate Body recognized that a subsidy could be received by a "group of persons." From this, the EC argues that *every* subsidy to *a company* must be treated as having been received by a group of persons consisting of that company together with its shareholders.[4] *Canada Aircraft* reached no such conclusion. *Canada Aircraft* involved export subsidies to the Canadian aircraft industry. There were multiple corporate recipients of these subsidies, *each* of which was a separate company that received both a financial contribution and a benefit in its own corporate capacity.[5] The Appellate Body had no occasion to consider whether each one of these individual subsidies also benefitted the shareholders of each recipient company and, in fact, did not address that issue. It simply recognized that a subsidy could have multiple recipients.

8. **The EC's misinterpretation of the definition of the word "firm"** in the OED is similar. The EC argues that, because the word "firm," *can* refer to a group of people not formally organized as a business, it must *always* refer to a group of people. Allegedly, it follows that a subsidy bestowed upon a company must be attributed to a group of people consisting of that company and also its shareholders. This is a distortion of the OED's definition. The OED defines a "firm" as a company, partnership, or group of people working together without any

[4] EC Appellee Submission, para. 45.

[5] *Canada Measures Affecting the Export of Civilian Aircraft*, Report of the Panel as modified by the Appellate Body, adopted 14 April 1999, paras. 9.214-9.226.

formal organization.[6] These are *alternate* forms which a "firm" can take. The United States does not dispute that a subsidy *could* be bestowed upon a group of companies, as in *Canada Aircraft*, or upon a group of individuals. In such a case, the benefit would be divided equally between those companies or individuals. But once a subsidy has been bestowed upon a particular company (regardless of whether it was the only company or one of a group of companies to receive the subsidy), the "firm" receiving that particular subsidy *is that company*. The OED definition does not imply that each individual "firm" must consist of more than one person, even when the "firm" is a company.

9. In addition to these basic inconsistencies with the text of the SCM Agreement**, the EC's argument necessarily denies subsidy benefits their logical consequence under the SCM Agreement**, and is therefore inconsistent with the object and purpose of the SCM Agreement of providing a remedy to offset injurious subsidies. If an investigating authority demonstrates that a producer or exporter of subject merchandise received a financial contribution and a benefit from that contribution, and injury is shown, then that merchandise may be subject to countervailing duties. Thus, attributing a subsidy benefit to a producer or exporter is not a mere rhetorical exercise – it carries with it potential exposure to countervailing duties.

10. Commerce's practice is consistent with this scheme. It attributes the benefits from export subsidies to all of each recipient's exports and attributes the benefits from domestic subsidies to all of each recipient's domestic production.[7] There is no meaningful sense in which a subsidy

[6] The *New Shorter Oxford English Dictionary*, Clarendon Press, Oxford, 1993.
[7] Commerce CVD Regulations, 19 CFR 351.525(b)(3).

may be "attributed" to the recipient's shareholders because shareholders, as such, have no exports and produce no merchandise. They are simply investors, entitled to a share of the profits, if any, that the company earns.

11. If some portion of subsidy benefits were attributable to the recipient company's shareholders, the benefit attributable to the company itself would decline proportionately. Yet, no respondent company in a CVD proceeding in any country has ever argued that its rate was too high because some portion of a subsidy it received should have been attributed to its shareholders. Certainly AST made no such claim before its privatization. Nor has the EC ever adopted a methodology in its own CVD practice which suggests that part of every subsidy benefit accrues to the recipient's shareholders. In fact, as we have shown, the EC's practice is to the contrary.[8] The reason is simple – before the EC's second submission to the Panel, no one had ever imagined that subsidy benefits were attributable, in part, to shareholders.

12. The highly specialized sense in which the EC evidently believes that shareholders receive subsidy benefits carries with it no potential CVD liability – countervailing duties may be applied exactly as if the subsidy benefits were received by the companies upon whom they were bestowed. The new role of co-subsidy recipient that the EC assigns to shareholders seems to have only a single consequence – where there has been a change in ownership, it causes the subsidy recipient (as defined by the EC) to disappear.

13. **Second, the EC incorrectly characterizes Commerce's practice as disregarding the distinction between companies and owners.** The EC notes that Commerce sometimes

[8] U.S. Appellant Submission, para. 81.

allocates subsidies between members of corporate groups upon which they were bestowed (an issue not within the terms of reference of this dispute), and argues that this shows that Commerce does not recognize any distinction between companies and other companies or shareholders.[9] Commerce's practice actually demonstrates the opposite.

14. For example, when the French Government bestowed large subsidies upon Credit Lyonnais, Commerce did not attribute any of those subsidies to the French steel producer Usinor, despite the fact that Credit Lyonnais owned a substantial portion of the outstanding shares of Usinor. Indeed, Commerce declined even to investigate whether these subsidies benefitted Usinor, absent evidence that money had subsequently flowed from the bank into the steel company.[10] In other words, while Commerce recognized that Credit Lyonnais could be *a conduit* for subsidies to Usinor, it also recognized that the two are distinct and their relationship is only that of stock holder to stock issuer.

15. In contrast, where an untied subsidy has been bestowed upon a corporate group at the holding-company level, it must be allocated to the entire group. Governments do not subsidize holding companies that produce nothing. The members of corporate groups across which subsidies are allocated generally publish consolidated financial statements in recognition of the fact that, as a practical matter, they are in business together.

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[9] EC Appellee Submission, paras. 49-50.

[10] *Cf.*, *Certain Cut-to-Length Carbon-Quality Steel Plate from France*, 64 Fed. Reg. 73,277, 73,293 (Dept. Comm. Dec. 29, 1999).

16. **Third, Commerce's "same person" test is not a "same production" test.** The EC claims that Commerce's "same person" test is really a same production test.[11] As we explained in our written submission, however, Commerce's test relies upon four factors.[12] Two of these – whether the company holds itself out as the same entity and whether there is continuity of assets and liabilities – are independent of production. That Commerce's same person test focuses on more than production may also be seen from the fact that, in three recent proceedings, a change in ownership resulted in the termination of the previous subsidies.[13] This is the opposite of the result that Commerce would have reached under its old approach.

17. **Fourth, the Appellate Body's report in *Lead and Bismuth II* does not support the EC's hybrid producer-investor theory.** The EC asserts that *Lead and Bismuth II* implicitly endorses its theory that the "state-owned producer" and the "privatized producer" are, by definition, distinct entities.[14] The Appellate Body implied no such thing. As explained in the U.S. appellant submission, the Appellate Body did not address the issue of whether the new and old entities were distinct legal persons because this was not necessary in order for the Appellate Body to reach its conclusion. Commerce had allocated the subsidies based on the premise that they lodged in productive units. The emphasis on productive units at that time made the precise identities of the owners of these units less important – goods produced in those units were

[11] EC Appellee Submission, para. 92.
[12] U.S. Appellant Submission, para. 21.
[13] Two of these proceedings are discussed in the U.S. Appellant Submission at paras. 23 - 24. The third is *Certain Cold-Rolled Carbon Steel Flat Products from Argentina*, 67 Fed. Reg. 62,106 (Dept. Comm. Oct. 3, 2002), USDOC Decision Memorandum dated Sept. 23, 2002.
[14] EC Appellee Submission, para. 27.

subject to countervailing duties regardless of whether the corporate entities of which those units were a part had changed.

18. Thus, when the Appellate Body addressed the issue, it simply recited that the change in ownership in question had led to the creation of new entities – UES and BSES.[15] The Appellate Body treated these new entities as different from the original subsidy recipient because they were nominally different, because it did not have clear evidence that they should be treated any other way, and because resolving this potentially thorny issue was simply not necessary.

19. **Fifth, Commerce's same person test is not an "intermediate step" that fails to analyze whether the benefit from a subsidy survives a privatization.** The EC asserts that the same person test is an "intermediate step" which Commerce has imposed before determining whether a privatization transaction has terminated the benefit from previous subsidies.[16] When Commerce's test results in the conclusion that the subsidy continues to reside with the producer, the EC argues that Commerce has avoided its obligation to reconsider whether the benefit continues following a change in ownership.

20. This claim is absurd. A complete analysis of a sales transaction involves identifying the parties to that transaction, what was sold, and the price paid. A price cannot be analyzed in a vacuum. It is not possible to conclude that the buyer paid the seller fair market value without knowing what was sold. Where what was sold was outstanding shares of a subsidized company (which was not itself a party to the transaction), Commerce must take this fact into account in

[15] *US - Lead and Bismuth II* (AB), para. 62.
[16] EC Appellee Submission, paras. 87-89.

determining whether the sale had any effect upon that company. Thus, Commerce's inquiry into whether the subsidy recipient was dissolved as a result of a sale is an integral part of its analysis of whether that sale terminated the subsidy benefit – not an "intermediate step" to avoid such an analysis.

21. **Sixth, the EC's Assertion that CVD liabilities are fundamentally different from other liabilities is incorrect.** The EC makes some fine distinctions between CVD liabilities and other liabilities, and wrongly concludes that CVD liabilities are not actually liabilities. First, subsidies create liabilities that, in essence, are like other liabilities. After completing an action like polluting the local groundwater or receiving a subsidy, a company is subject to a potential liability – a potential burden on its future earnings. This potential liability will become actual only if a second event occurs – the bringing of an enforcement action seeking damages from the pollution or a CVD action seeking a remedy for the subsidies. Second, the EC's fine distinctions miss the point. The United States does not maintain that CVD liabilities are exactly like all other liabilities, any more than those other liabilities are all exactly alike. CVD liabilities are a particular kind of liability. But they are liabilities, and not assets, which the EC implicitly recognizes by contesting them.

22. **Seventh, the EC wrongly characterizes the U.S. argument as relying upon the existence of economic distortion.** The EC asserts that the United States argues that subsidies may remain countervailable following a change in ownership because they may continue to cause

market distortion.[17] This is a serious mischaracterization of the U.S. argument. It is perfectly true that the economic distortion caused by a subsidy will continue undiminished following a sale of the recipient's shares for fair market value. The United States has made this point to disprove the EC's claim that economic logic supports its position. But that is not the basis of the United States' argument. Economic distortion in the market for merchandise produced by subsidy recipients is not relevant to the existence of a subsidy. That is an issue for the injury determination.

23. Under the SCM Agreement, the amount of a subsidy is simply the amount initially bestowed upon the recipient on terms more advantageous than it could have obtained in the marketplace. The United States has never proposed to countervail the market value of subsidies, the competitive benefit from subsidies, or the market distortion caused by subsidies – only the amount of the subsidies themselves, as valued under Article 14 and amortized over time. They remain countervailable after a change in ownership because they remain subsidies, not because they continue to cause economic distortion.[18]

24. **To sum up,** the Panel's finding requires acceptance of the proposition that, in crafting the SCM Agreement, WTO Members chose to disregard the basic distinction between companies and shareholders that applies in virtually all countries and that has been recognized for purposes of international law. Instead, according to the EC, the drafters, without explanation, secretly substituted a novel theory which cannot be reconciled with the ordinary meaning of the core

[17] EC Appellee Submission, para. 76.
[18] U.S. Appellant Submission, para. 101.

provisions of the SCM Agreement. We must also accept that this new theory has no consequence under the SCM Agreement except where there is a change in ownership of a subsidized company. Finally, we must accept that the Members made this radical substitution despite their decision not to address changes in ownership in the SCM Agreement – with the exception of Article 27.13, which is inconsistent with the Panel's new theory.

25. This is simply not a permissible interpretation of the SCM Agreement, much less – as the Panel and EC would have it – the *only* permissible interpretation. If the treaty drafters intended to give a special meaning to the term "firm" or "enterprise," they would have needed to have done so in the text. They did not. The United States urges the Appellate Body to give the terms in the SCM Agreement their ordinary meaning, which leads to the rather ordinary conclusion that subsidy benefits are received by the firms upon which they are bestowed. As long as the subsidy recipient remains the same corporate person, it retains all of its assets and liabilities, including its CVD liabilities.

## II. The Panel Erred in Finding that Section 1677(5)(F) Is Inconsistent with U.S. WTO Obligations

26. Turning to the Panel's findings regarding the U.S. statutory provision in question – Section 1677(5)(F) – the United States notes at the outset that the EC agrees that the Panel found that the statute, on its face, is not inconsistent with the SCM Agreement, but then challenges the Panel's finding in its appellee submission.[19] Consistent with the Appellate Body's teachings in the *Reformulated Gas* case, if the EC disagreed with the Panel's finding, it should have appealed

[19] EC Appellee Submission, para. 108.

that finding.[20] Because it failed to do so, the EC's challenge on that point is not properly the subject of this appeal.

27. This leaves us with the with the Panel's analysis of *Delverde III*. The Panel said that "the current state of the law in the United States today is that expressed by the US Court of Appeals for the Federal Circuit in *Delverde III*."[21] In addition, the Panel said that *Delverde III* stands for the proposition that "Section 1677(5)(F) prevents a *per se* rule that privatization at arm's-length and for fair market value extinguishes the benefit *vis-à-vis* the privatized producer."[22] However, *Delverde III* applied to an asset sale, not a sale of shares, and the Panel's conclusion simply is inconsistent with the following statement by the Court:

> Had Commerce fully examined the facts, it might have found that Delverde paid full value for the assets and thus received no benefit from the prior owner's subsidies, or Commerce might have found that Delverde did not pay full value and thus did indirectly receive a "financial contribution" and a "benefit" from the government by purchasing its assets from a subsidized company "for less than adequate remuneration.[23]

28. Neither the Panel nor the EC has ever been able to reconcile this statement with the notion that *Delverde III* requires a WTO-inconsistent result in any category of cases. The Panel simply refused to discuss this passage at all, and, in so doing violated its duty under Article 11 of the DSU to make an objective assessment of the facts.

29. The EC, for its part, has no substantive response, but instead makes a procedural argument that the United States should have pointed this passage out to the Panel sooner than it

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[20] *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Report of the Appellate Body adopted 20 May 1996, page 12.

[21] Panel Report, para. 7.150.

[22] *Id*., para. 7.149.

[23] *Delverde III*, 202 F.3d at 1368.

did. This argument is invalid, however, because the U.S. arguments before the Panel were not based on an interpretation of *Delverde III*, but instead focused on the discretionary language of the statute and the Statement of Administrative Action. When, in its interim report, the Panel revealed that it was relying primarily on *Delverde III* as the basis for finding Section 1677(5)(F) to be WTO-inconsistent, the United States promptly identified the inconsistency between the Panel's finding and the statement of the Federal Circuit previously quoted. At that point, it was incumbent upon the Panel to either justify the inconsistency or revise its findings. The Panel did neither.

30. The EC's only other argument is to assert that Articles 10, 14, 19 and 21 of the SCM Agreement "do not admit of discretion".[24] The EC appears to argue that the mandatory/discretionary doctrine does not apply to these provisions, and that they can be violated if a Member's domestic countervailing duty law does not expressly preclude the possibility of action inconsistent with those provisions in particular cases.

31. The EC cites no authority for this proposition, because there is none. To the contrary, in the *Japan Hot-Rolled* case, the Appellate Body found in a single dispute that legislation, as such, was not WTO-inconsistent even though its application in the particular case was WTO-inconsistent.[25] Moreover, the EC fails to explain why the provisions it cites are of such a nature as to exclude them from the application of the mandatory/discretionary doctrine.

32. In summary, as the United States previously has stated, Section 1677(5)(F) provides the DOC with sufficient discretion to generate results considered by the Panel to be WTO-consistent.

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[24] EC Appellee Submission, paras. 123-127.
[25] *Japan Hot-Rolled*, para. 240(g).

Accordingly, the Appellate Body should reverse the Panel's finding that Section 1677(5)(F), as such, is inconsistent with U.S. WTO obligations.

## III. The Issues Raised by the United States Are Properly Before the Appellate Body

33. Finally, the United States will comment briefly on the EC's assertion that certain issues raised in the U.S. Appellant Submission are not properly before the Appellate Body.

34. At the outset, the United States disagrees with the EC's characterization of the U.S. letter of September 13 as a "supplementary Notice of Appeal".[26] The United States' Notice of Appeal was filed on September 9, and the September 13 submission simply responded to the Appellate Body's invitation to provide additional detail.

35. More importantly, in its Notice of Appeal, the United States identified the findings of the Panel that it was appealing. That is all that is required by Article 20(d)(2) of the *Working Procedures*, as interpreted by the Appellate Body in the *Shrimp* dispute.[27] The United States was not required to identify in its Notice of Appeal all of the reasons why a particular finding was in error.

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[26] EC Appellee Submission, para. 13.

[27] *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Report of the Appellate Body adopted 6 November 1998, para. 95.